CHOR PHAIK HAR

v.

FARLIM PROPERTIES SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
TUN DATO' SERI HAJI ABDUL HAMID BIN HAJI OMAR, CHIEF JUSTICE
TAN SRI DATO' MOHD EUSOFF BIN CHIN, CHIEF JUDGE, MALAYA
TAN SRI DATUK EDGAR JOSEPH JR., FCJ
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH, FCJ
DATO' HAJI LAMIN BIN HAJI MOHD YUNUS, FCJ
[CIVIL APPEAL NO. 02-333 OF 1993]
9 SEPTEMBER 1994

INTERPRETATION: Provisos in statutes - Construction - Principles to be applied - Proviso to s. 322(1) National Land Code - Meaning and ambit of application - Whether to be read in the context of s. 322 in reference to the whole Code - Whether entry of caveat by persons claiming interest to a portion of land proscribed - National Land Code 1965 ss. 221, 214(1)(b), 241(1)(b), 322(1)(2)(3) & 323

INTERPRETATION: Ambigious legislation - Principles of construction - Exclusionary rule - Whether to be strictly applied - Hansard reports of procedings in Parliament - Whether an aid to statutory interpretation - Whether reference thereto to be allowed.

LAND LAW: Section 322(1) NLC - Private caveats - Entry of caveat in respect of part of alienanted land - Whether prohibited by proviso to s. 322(1) - Caveator caveating whole land but restricting the effect of caveat to area over which he claimed interest - Whether permissible.

WORDS AND PHRASES: "Provided that such a caveat shall not be capable of being entered in respect of part of the land" - Proviso to s. 322(1) NLC.

By section 90 of Act 587/84, which came into force on 25 March 1985, the Legislature had inserted into s. 322(1) of the National Land Code 1965 (NLC) a new proviso which read " Provided that such a caveat shall not be capable of being entered in respect of part of the land". Before the Federal Court herein, a preliminary point of law had arisen pertaining to the true meaning and ambit of this proviso, by virtue of the appellant contending that despite the said proviso, it is still permissible for a person with a claim to interest in part only of a piece of land to caveat the said land, and the respondent contending otherwise. In the course of their respective arguments, however, a question inevitably arose as to whether the proviso had the effect of nullifying the statement of law the Federal Court had enunciated in *N. Vangedaselam v. Mahadevan* [1976] 2 MLJ 161 when construing s. 322(1) that, "...you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion, you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim", or whether, on its true construction, the said proviso had merely redeclared the legal position enunciated in that case.

Held:

[1] The proviso to s. 322(1) is ambigious and is clearly open to two different constructions. Broadly stated, on the one hand, its effect is to nullify *Vangedaselam* and on the other, the effect is merely declaratory of *Vangedaselam*. Be that as it may, to give the

proviso its proper construction, the principle to apply is that the words therein must be read in their context, that is, the proviso must be read not only in the light of s. 322 as a whole but also in the light of the Code as a whole. Further, in interpreting such a proviso, by reason of its ambigious nature, the application of the exclusionary rule of interpretation ought to be relaxed, with the result that such external references as the Ministerial Statement and the Hansard reports could also be taken in for consideration.

[2] It is to be observed that, by virtue of ss. 221, 214(1)(b), 241(1)(b) and Part Seventeen Chapter One of the Code, a registered proprietor is conferred the right to deal with his land either in whole or in part. In addition, having regard to the categories of persons specified in s. 323(1)(a) of the Code, at whose instance a caveat may be entered, it would appear that a person claiming as such lessee, transferee, chargee or grantee of the easement, would be entitled to take advantage of the caveat procedure provided for in the Code. Bearing all these in mind, there is sufficient ground therefore to dismiss the contention that the said proviso nullifies *Vangedasalam*, as such a contention, if accepted, would lead to the startling conclusion that the types of dealings in part of the land, although permitted by s. 221 or para (b) of s. 214(1) or para (b) of s. 241(1) or Part Seventeen Chapter One NLC, will not give rise to an interest in land capable of being protected by caveat. Not only is this unjust, it will also clearly cause great hardship to one claiming an interest as lessee, transfree, chargee or grantee of an easement in such dealings.

[3] Reading the proviso in the light of s. 322 as a whole as well as in the light of the provisions of the other related sections in the Code, it can only be concluded that the proviso to s. 322(1) is purely declaratory of the principles enunciated in *Vangedaselam*, and therefore, a person who claims a registrable interest in a portion of a parcel of land may caveat the whole land provided he expressly limits the effect of the caveat to protect only his said claim.

[4] Even if resort to Hansard in the circumstances of this case is permissible, that by itself is not determinative of the issue since it is only available as an aid to interpretation. Having considered the various passages in the relevant Ministerial Statement reported in Hansard, it is clear that they cannot be of any assistance to resolve the ambiguity in the proviso. In the circumstances there is no reason for this Court to depart from what it had earlier said regarding the effect of the proviso to s. 322(1).

[Appeal in respect of the preliminary point of law allowed].

[Bahasa Malaysia Translation of Headnote]

PENTAFSIRAN: Proviso dalam statut - Pentafsiran - Prinsip-prinsip yang patut dipakai - Proviso kepada s. 322(1) Kanun Tanah Negara - Maksud dan lingkungan pemakaian - Samada patut dibaca dalam konteks s. 322(1) dan keseluruhan Kanun Tanah Negara - Sama ada kemasukan kaveat oleh orang-orang yang menuntut kepentingan kepada sebahagian daripada tanah dilarang - Kanun Tanah Negara 1965 ss. 221, 214(1)(b), 241(1)(b), 322(1)(2)(3) & 323.

PENTAFSIRAN: Perundangan yang tidak jelas - Prinsip-prinsip pentafsiran - Kaedah Pengeculian - Sama ada hendak digunakan secara tegas - Laporan prosiding di Parlimen oleh Hansard - Samada sebagai membantu pentafsiran statutori - Samada rujukan di dalamnya itu dibenarkan.

UNDANG-UNDANG TANAH: Seksyen 322(1) KTN - Kaveat persendirian - Kemasukan kaveat berhubung dengan sebahagian daripada tanah yang diberimilik - Samada

dihalang oleh proviso kepada s. 322(1) - Pengkaveat mengkaveat keseluruhan tanah tetapi menghadkan kesan kaveat kepada kawasan atas mana dia menuntut kepentingan - Samada dibenarkan.

KATA-KATA DAN FRASA: "Melainkan bahawa kaveat sedemikian tidak berupaya dimasukkan berhubung dengan bahagian tanah tersebut - Proviso kepada s. 322(1) KTN.

Melalui s. 90 Akta 587/84 yang berkuatkuasa pada 25 Mac 1985, Badan Perundangan telah memasukkan suatu proviso baru ke dalam s. 322(1) Kanun Tanah Negara 1965 (KTN) yang berbunyi seperti berikut "Melainkan bahawa kaveat sedemikian tidak berupaya dimasukkan berhubung dengan bahagian tanah tersebut." Di hadapan Mahkamah Persekutuan di sini, suatu persoalan undang-undang awalan telah timbul berhubung dengan maksud sebenar dan lingkungan proviso ini, di mana perayu mendebatkan bahawa walaupun terdapat proviso tersebut, seseorang yang menuntut kepentingan dalam sebahagian daripada tanah berkenaan masih lagi dibenarkan untuk mengkaveat tanah tersebut. Responden pula mendebatkan sebaliknya. Walau bagaimanapun dalam mereka berdebat itu, timbul suatu persoalan yang tidak dapat dielakkan berhubung dengan sama ada proviso tersebut mempunyai kesan untuk membatalkan kenyataan undang-undang yang dinyatakan oleh Mahkamah Persekutuan dalam kes *N. Vangedaselam v. Mahadevan* [1976] 2 MLJ 161 dalam mentafsirkan s. 322(1) iaitu, "... sama ada kamu mengkaveat keseluruhan tanah atau tidak langsung, dan bahawa jika kamu menuntut kepentingan dalam sesuatu bahagian, kamu boleh mengkaveat keseluruhan tanah dengan syarat kamu dengan nyatanya menghadkan kesan kaveat bagi melingungi tuntutan kamu sahaja", atau sama ada, atas pentafsiran sebenarnya proviso tersebut hanya semata-mata mengisytiharkan semula kedudukan undang-undang yang disebutkan dalam kes tersebut.

Diputuskan:

[1] Proviso kepada s. 322(1) adalah samar-samar dan jelas terbuka kepada dua pentafsiran yang berlainan. Bila dinyatakan secara luasnya, di satu pihak kesannya ialah untuk membatalkan kes *Vangedaselam* dan di satu pihak lain kesannya hanya mengisytiharkan kes *Vangedaselam*. Jika begitu keadaannya, untuk mentafsirkan proviso tersebut dengan betul, prinsip yang perlu dipakai ialah kata-kata di dalamnya itu hendaklah dibaca dalam konteksnya, iaitu proviso bukan sahaja patut dibaca berdasarkan kepada s. 322 secara keseluruhannya, tetapi juga berdasarkan kepada Kanun tersebut secara keseluruhan. Seterusnya, dalam mentafsirkan proviso yang sedemikian, akibat sifatnya yang tidak jelas itu, pemakaian kaedah pentafsiran pengecualian hendaklah dilonggarkan, dengan keputusannya bahawa rujukan-rujukan seperti Pernyataan Menteri dan laporan-laporan Hansard juga dapat diambil untuk pertimbangan.

[2] Perlulah dipatuhi bahawa melalui s. 221, 214(1)(b), 241(1)(b) dan Bahagian Tujuh Belas Bab 1 Kanun tersebut, tuanpunya yang berdaftar diberi hak untuk berurusan dengan tanahnya secara keseluruhan atau secara sebahagian. Tambahan lagi, berdasarkan kepada kategori orang-orang yang dinyatakan dalam s. 323(1)(a) Kanun tersebut, atas kehendak siapa suatu kaveat boleh dimasukkan, ketara bahawa seseorang yang menuntut sebagai penerima pajakan, penerima pindahmilik, pemegang gadaian atau penerima isemen, ia boleh mengambil peluang akan prosedur kaveat yang diperuntukkan dalam Kanun tersebut. Dengan mengambilkira kesemua ini, terdapat alasan yang cukup untuk menolak penghujahan bahawa proviso tersebut membatalkan *Vangedasalam*, kerana jika penghujahan sedemikian diterima, ia akan membawa

kepada kesimpulan yang mengejutkan bahawa urusan seperti itu dalam sebahagian daripada tanah berkenaan tidak akan menimbulkan kepentingan dalam tanah yang berupaya dilindungi oleh kaveat walaupun dibenarkan oleh s. 221 atau perenggan (b) s. 214(1) atau perenggan (b) s. 241(1) atau Bahagian Tujuh Belas Bab Satu KTN.

[3] Membaca proviso di bawah s. 322 secara menyeluruh dan juga di bawah peruntukan lain-lain seksyen yang berkaitan dalam Kanun tersebut, ia hanya boleh disimpulkan bahawa proviso kepada s. 322(1) hanya mengisytiharkan prinsip-prinsip yang dinyatakan dalam kes *Vangedasalam*, dan oleh yang demikian, seseorang yang menuntut kepentingan berdaftar dalam sebahagian daripada tanah berkenaan boleh mengkaveat keseluruhan tanah tersebut dengan syarat dia dengan nyatanya menghadkan kesan kaveat untuk melindungi tuntutannya sahaja.

[4] Sekalipun jika penggantungan kepada Hansard dalam keadaan kes ini dibenarkan, ianya sendiri tidak dapat memutuskan isu berkenaan memandangkan ia hanya boleh digunakan sebagai bantuan dalam pentafsiran. Setelah menimbangkan beberapa petikan dalam Pernyataan Menteri yang berkenaan dan yang dilaporkan dalam Hansard, adalah jelas bahawa ia tidak dapat membantu untuk menyelesaikan kesamaran dalam proviso tersebut. Dalam hal ini tiada sebab untuk Mahkamah bagi memisahkan dirinya daripada apa yang telah dinyatakan olehnya terdahulu daripada ini berhubung dengan kesan proviso kepada s. 322(1).

[Rayuan berhubung dengan persoalan undang-undang awalan dibenarkan].

Cases referred to:
Gelberg v. Milier [1961] 1 WLR 153 ***(cit)***
Mullins v. Treasurer of Surrey [1880] 5 QBD 170 ***(refd)***
Re Memco Engineering Ltd. [1986] Ch 86 ***(refd)***
Tan Heng Poh v. Tan Boon Thong [1992] 3 CLJ 1340/[1992] 2 MLJ 1 ***(not foll)***
N. Vangedaselam v. Mahadevan & Anor. [1976] 2 MLJ 161 ***(affirmed)***
Cheatley v. The Queen [1972] 127 CLR 291 ***(refd)***
Attorney-General (Canada) v. Hallet & Carey Ltd. [1952] AC 427 ***(refd)***
Farrell v. Alexander [1978] AC 59 ***(refd)***
Hatton v. Beanmont [1977] 2 NSWLR 211 ***(refd)***
Young v. Farrah & Nicholas Enterprises Pty. Ltd. [1976] 13 SASR 444 ***(cit)***
Lord Nelson v. Tucker [1802] 3 B. & P. 257 ***(refd)***
Coyne v. Brady [1863] 9 LT 30 ***(refd)***
Registrar of Titles, Johor Baharu v. Temenggong Securities & Anor. [1976] 2 MLJ 44 ***(refd)***
Peter Lai v. Collector of Stamp Duties [1973] 2 MLJ 33 ***(affirmed)***
Arataki Honey Ltd. v. Minister of Agriculture and Fisheries [1979] 2 NZLR 311 ***(foll)***
Canada Sugar Refining Co. v. The Queen [1898] AC 735 ***(foll)***
Ex parte Bouvy (No. 3) [1900] 18 NZLR 608 ***(foll)***
Pepper v. Hart [1992] 3 WLR 1032 ***(foll)***
R. v. Warwickshire County Council ex p. Johnson [1993] 2 WLR 1 ***(cit)***
Stubbings v. Webb [1993] 2 WLR 120 ***(cit)***
Foster v. Chief Adjudication Officer [1993] 2 WLR 292 ***(cit)***
Tan Boon Yong v. Controller of Income Tax [1993] 2 SLR 48 ***(refd)***
Raffles City Pte. Ltd. v. A.G. [1993] 3 SLR 580 ***(refd)***
Low Kok Wai v. PP [1994] 1 SLR 676 ***(refd)***
Davis v. Johnson [1979] AC 264 ***(cit)***
Hadmor Production Ltd. v. Hamilton [1983] 1 AC 191 ***(cit)***

Legislation referred to:
Housing Development (Control & Licensing) Act 1966
Interpretation (Amendment) Act 1993

National Land Code 1965, ss. 211, 221, 214(1)(a), (b), 241(1)(b), 322(1)(a), (b), (2)(a), (b), (c), (3)(a), (b)(i), (ii), 323(1)(a), (b), (c), (2), 324(2)(a), 417(2), Part Seventeen, Chapter 1
Interpretation Act 1901, s. 15 AB (Australia)

Other sources referred to:
National Land Code (2nd Edition), Judith Sihombing, pp. 730, 731
"Perfection - But at what cost?", Brian Davenport, (1993) 109 Law Quarterly Review 149
Practice Statement (Judicial Precedent) (1966) 1 WLR 1234
"**Private Caveats Emasculated"**, Sethu, [1992] 2 MLJ xxxv
Statutory Interpretation, Francis Bennion, 2nd Edn., p. 494
Statutory Interpretation, Jim Evans, OUP, New Zealand, 1989, 290-291
"Statutory Interpretation and Parliamentary Intention", J.H. Baker, (1993) 52 Cambridge Law Journal 353
"Taxing Perks and Interpreting Statutes", David Miers, (1993) 56 Modern Law Review 695
Torrens System in New South Wales, Woodman & Nettle, p. 524/19, para 74F.7 (Release 7)

For the appellant - N. Chandran (Jannu bt. Babjan with him); M/s. Lim Cheng Poh, Lim & Rahim
For the respondent - R.R. Sethu (R. Rajasingam with him); M/s. R. Rajasingam & Co.

JUDGMENT

Edgar Joseph Jr. FCJ:
The preliminary point of law raised by this appeal resolves itself into the question of the true meaning and ambit of the proviso to s. 322(1) of the National Land Code 1965, ('the Code"), inserted by s. 90 of Act A587/84, which came into force on 25 March 1985, and which says:

> Provided that such a caveat shall not be capable of being entered in respect of part of the land.

The main provision - in this case, s. 322(1) of the Code - which the proviso seeks to qualify or modify - says:

322(1) A caveat under this section shall be known as a 'private caveat', and -

(a) may be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in s. 323;

(b) shall have the effect specified in sub-section (2) or (3), according as it is expressed to bind the land itself or merely a particular interest therein.

Then, of course follows the proviso reproduced above.

To put the matter in perspective, the other provisions of the Code which it would be convenient to reproduced are ss. 322(2) and (3) and 323(1) and (2). These provisions are as follows:

322(2) The effect of any private caveat expressed to bind the land itself shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of -

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

(3) The effect of any private caveat expressed to bind a particular interest only shall, subject to sub-section (4) and (5), be to prohibit the registration, endorsement or entry on the register document of title of -

(a) any instrument of dealing directly affecting that interest (including any certificate of sale relating thereto); and

(b) where that interest is a lease or sub-lease -

(i) any claim to the benefit of any tenancy exempt from registration granted directly thereout, and

(ii) any lien-holder's caveat in respect thereof.

323(1) The persons or bodies at whose instance a private caveat may be entered are -

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;

(b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and

(c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B and such application shall be attested in accordance with the provision of s. 211 and shall state therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.

Now, the task of construing provisos is not always free from difficulty. (See *Gelberg v. Milier* [1961] 1 WLR 153, 159). A true proviso is something which qualifies or modifies the section to which it is a proviso. It must, therefore, be read having regard to the section itself. Generally speaking, the effect of a proviso is to take out of the section something that would otherwise fall within its ambit. This principle has been aptly put by Lush J. (as he was then) in *Mullins v. Treasurer of Surrey* [1880] 5 QBD 170, 173, as follows:

> When one finds a proviso to the section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso.

However, commenting on this dictum, in his book on **Statutory Interpretation**, 2nd Edition, p. 494, Mr. Francis Bennion says this:

> ... whilst the substance of this dictum is undoubtly correct, the treatment of the proviso as qualitatively different from the rest of the section is not. The entire section, including the proviso, is an operative component of the Act. (*Gubay v. Kington (Inspector of Taxes)* [1984] 1 WLR 163 per Lord Scarman (dissenting, but not on this point at 169-170).

In *Re Memco Engineering Ltd.* [1986] Ch. 86 at 98 Mervyn Davies J. said:

> a proviso is usually construed as operating to qualify that which precedes it.

A proviso can also be inserted in a statute to make sure that the statute does not have the particular effect that it might have if the proviso were not inserted.

Before us, the main plank in the submission of leading Counsel for the respondent, Mr. Sethu, regarding this part of the case, was that by reason of the proviso, a person

with a claim to title or interest in a portion of land, may not caveat at all, since he would be claiming an interest in part only of the land. In this he was supported by the judgment of the Supreme Court in *Tan Heng Poh v. Tan Boon Thong* [1992] 2 MLJ 1, which concerned a dispute between the beneficiaries of the estate of a deceased person. More particularly, the deceased had died, testate, leaving, *inter alia*, eight parcels of land. Under the will of the deceased, a son of the deceased and his five brothers, were each entitled to a one-sixth share in the estate. There was a dispute between members of the family concerning alleged breaches of a family arrangement, which resulted in an action commenced by the plaintiff and another brother against the other beneficiaries. To preserve the *status quo* pending the determination of the action, the plaintiff had entered a private caveat under s. 323(1) of the Code against all the eight parcels of land on the ground that he was beneficially entitled to them.

The defendants then applied to have the caveat removed, and the High Court made an order directing removal of the caveat. From that decision the plaintiff appealed to the Supreme Court which in dismissing the appeal held:

(a) that the caveat was invalid for non-compliance with s. 323(2) of the Code because although it related only to a limited interest in the eight parcels of land, yet it was expressed to bind the whole of the lands;

(b) the caveator plaintiff, being only a beneficiary under the will, had no caveatable interest until the estate had been fully administered.

That would appear quite sufficient to dispose of the case. But, Azmi SCJ, speaking for the Supreme Court, went on, to consider the effect of what he described as "the new proviso" to s. 322(1) of the Code, which was not in dispute, in the following terms:

> ... could a person who was only interested in a specific portion of land enter a caveat against the land, having regard to the new proviso to s. 322(1) of the Code? With effect from 25 March 1985, a proviso has been added by Act A587 which provides: 'Provided that such a caveat shall not be capable of being entered in respect of a part of the land.'
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> In concluding his judgment in *Mosbert Bhd. (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446, Seah SCJ, in referring to the new amendment observed at p. 449 that the judgment of the Court dealing with the private caveat 'would now seem to be of academic interest only.' We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited only to that specific portion.
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> In our view the new proviso in s. 322(1) had indeed affected the judgment of the Federal Court in *N. Vangedaselam v. Mahadevan & Anor.* [1976] 2 MLJ 161. With the greatest of respect, the learned Lord President had correctly stated the law as it stood, at p. 163:
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> > ...you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion, you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.
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> The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under s. 322 is now subject to an omnibus proviso that, 'such a caveat shall not be capable of being entered in respect of a part of the land'. Thus, notwithstanding the fact that a person can bring himself under one of the categories of persons under s. 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering

a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s. 323(1) relates to only part of the land. In our opinion, this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself. The legal position prior to *Vangedaselam* would now appear to be authoritative, which means that a person who is interested only in a specific portion of land cannot enter a caveat against the land. If a person claimed only a limited title or interest in the alienated land, then his caveatable claim would be caught by the new proviso to s. 322(1).

These remarks as to the effect of the proviso to s. 322(1) were unnecessary to the conclusion and therefore really *obiter dicta*. Nevertheless, as the remarks were accompanied by a certain degree of deliberation they must be regarded as valuable and therefore call for serious consideration. Before us, the point as to the effect of the proviso to s. 322(1) arose acutely for decision, and was therefore argued in a way to bring it under much fuller consideration. Broadly stated, the point argued before us was whether its effect is to nullify the judgment of the Federal Court in *Vangedaselam* or to be merely declaratory of the legal position enunciated in *Vangedaselam*.

It is right to say at the risk of being trite, that in interpreting a statute, what the Court is endeavouring to do is to give effect to the object and intent of Parliament in enacting that statute. In *Cheatley v. The Queen* [1972] 127 CLR 291 at 296 Barwick CJ said: "In construing the section we are seeking Parliament's intention." Similarly, in *Attorney-General (Canada) v. Hallet & Carey Ltd.* [1952] AC 427 at 449, Lord Radcliffe said: "...every statute is to be expounded according to its manifest or expressed intention."

To whom can the Judges turn for help in their task of determining Parliament's intention? The orthodox view is, not Parliament or the draftsman; they have to discover that intention from the words that Parliament has used in the particular statute. This proposition has been well brought out by Lord Simon of Glaisdale in *Farrell v. Alexander* [1978] AC 59 at 81:

in the construction of all written instruments including statutes, what the Court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said. It is in this sense that 'intention' is used as a term of art in the construction of documents.

In *Hatton v. Beanmont* [1977] 2 NSWLR 211 at 225, the Court had occasion to observe:

The function of the Court...is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases...such an intention is not expressed and the Court's task is, by the application of the appropriate principles, to divine or impute that intention.

It is a truism that Parliament does not always use plain words to express its intention and when this is the case so that the words used fail to convey the intention, Courts may then have to resort to the device of ascertaining that intention by necessary implication from the words which Parliament has used. Courts are, however, slow to find an intention by mere implication. (See *Young v. Farrah & Nicholas Enterprises Pty. Ltd.* [1976] 13 SASR 444 at 454 per Hogarth J.).

Having said that, we must now turn to consider the problem of construction regarding the effect of the proviso to s. 322(1).

Judith Sihombing in her work on the National Land Code (2nd Edition) has pointed out why, in her view, the proviso to s. 322(1) is open to two interpretations (at pp. 730 and 731, the emphasis being ours.) This is how she puts it:

> The amendment in 1984 expressly said that a 'caveat shall not be capable of being entered in respect of part of the land.
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> However, the amendment is not clear. For example, if the land is to be sub-divided and the purchaser is purchasing a part, then he might wish to caveat to protect the interest he has; this interest will be a right to claim a particular sub-divided part when the sub-division has been concluded. But what does the proviso say? There are two possibilities, namely:
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> (1) **the purchaser may not caveat at all** because he will be claiming an interest in part only of the land, and the proviso contains a proscription on such a caveat (Emphasis added). Thus, in *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 2 MLJ 446, the caveator had caveated the whole of the land although her claim related to a part only. Thus the caveator:
>
> > could not lawfully lodge a private caveat expressed to bind the whole of the said land. Such a caveat would be defective and void as being contrary to the express provision of ss. 322(1)(b), 323(2) and 324(2)(a) of the Code... The learned Judge [in the High Court] seemed to have recognized this and purported to order a remedial affidavit to be sworn by the respondent to rectify this error in the private caveat pursuant to s. 417(2). In our opinion, sub-section (2) does not empower the High Court to make such an order. The section is of limited application only and is intended to authorise the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the Court affecting the land. It does not, in our judgment, give powers to the Court to allow a defective or void private caveat to be amended by the caveator. For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one. (Seah SCJ, delivering the judgment of the Court, at pages 448-449].
>
> The Supreme Court noted that the proviso had been added during the Court hearing, so that part of the judgment relating to the caveat 'now seems to be of academic interest only' (at page 449); or
>
> (2) **the purchaser may caveat** but restrict the effect of the caveat to that area over which he claims an interest. In other words, he uses the *Vangedaselam* approach. (Emphasis provided)

By way of illustration, the learned author says this:

> Thus, in *Easow Plantations Sdn. Bhd. v. Mosbert Berhad (In Liquidation)* [1988] 1 MLJ 298 the proprietor sub-divided the land and sold the lots prior to the issue of individual titles to the new lots so that the purchasers caveated, even though they had paid the full purchase price. The vendor went into liquidation and the liquidator sold the land to the appellant. Two appeals were heard together.
>
> In one appeal it was unclear how the caveator had obtained its interest and although the caveat was to affect part only of the land, the 'missing link' (Salleh Abas LP (delivering the judgment of the Court) at page 299) did not satisfy s. 323(2). In the other case, the caveator had limited the caveat to affect the area of his purchase and the caveat could remain.

The learned author then expresses regret about the ambiguity of the proviso to s. 322(1) of the Code and makes some suggestions when she says this:

> It is unfortunate that the amendment to the sub-section was not plainer so that there was no doubt that
>
> (1) the claimant for part only of the land could caveat; and
>
> (2) the caveat should be over the whole of the land but expressed to cover part only.
>
> If the caveat can then be entered, Form 19B should contain, where possible, a plan showing the extent of the caveated interest. Of course, in some cases, the interest claimed will not relate to a physical part of the land but to a share as co-proprietor (*Tee Chin Yong v. Earnest Jeff* [1963] MLJ 118) for which no plan is possible.

We also note that the dicta of Azmi SCJ in *Tan Heng Poh* has come under heavy fire in an article by Mr. Sethu himself entitled **"Private Caveats Emasculated"** reported in [1992] 2 MLJ xxxv, who, as we have said, appeared as leading Counsel for the respondent in the present appeal. In his article, by way of preliminary, Mr. Sethu says:

> The consequences of the decision is that the Seremban triology of cases (referring to *Tee Chin Yong v. Ernest Jeff* [1963] MLJ 118 per Ismail Khan J. (as he then was); *Woo Yok Wan v. Loo Peck Chee* [1975] 1 MLJ 156 per Ajaib Singh J. (as he then was) and *Poh Kew Chai v. Yeoh Thian Seng* [1975] 1 MLJ 220 per Hashim Yeop A. Sani J. (as he then was)) have been reinstated. Whatever doubts there were in *Stella D'Cruz* (referring to *Mosbert Bhd. v. Stella D'Cruz* [1985] 2 MLJ 446 (SC) and, in particular, to the dictum of Seah SCJ at the end of his judgment, which indicates that with effect from the date of the coming into force of the new proviso to s. 322(1) of the Code, no private caveat may be entered by the Registrar against any land where the caveator is interested in a specific portion of it (even though its effect was expressly intended to be limited to that specific portion) have been put to rest. There can be no caveat by a person claiming a partial interest in land and the prohibition cannot be circumvented.

On a pessimistic note, he adds:

> The result is one of gloom and darkness. A person who buys a portion of an unsub-divided land or purchaser of a housing unit from a developer before the approval or issue of a sub-divided or strata title, is left without protection. Neither the buyer nor his financier can validly or effectively secure his interest in the land.

Referring to the impact of Azmi SCJ's dicta in *Tan Heng Poh* on the practice of local banks in this area of the Law, he says this:

> The present practice of banks lodging private caveats over land, following an assignment of the sale and purchase agreement, has become invalid and useless.

He then offers certain solutions but draws attention to the practical difficulties involved in implementing them:

> The only way out seems to be to obtain an undertaking from the bridging financier/chargee, that he would hold the main title subject to, and not part with the main title to the prejudice of, the purchaser. How many banks would assume or undertake this responsibility? In cases where there is no such bridging financier/chargee the situation is worse: the undertaking of the proprietor might prove to be worthless. It is to safeguard against the worthlessness of such undertakings that the claimant lodges caveats to have a hold on the land. The malaise (the unreliability of the developer's undertaking), which is the source of the problem, cannot become or provide the cure.

> The banks would either refuse to finance such purchases on the security of the property purchased or would require other collaterals. More stringent terms may also be imposed. How many consumers can afford to meet the stringent requirement of the banks? There must be provision at least in the cases of housing development, as defined in the Housing development (Control & Licensing) Act 1966 to permit caveats of portions of the land. In these cases the titles are bound to be issued as the developer cannot commence the development at least until the sub-division is approved.

In a final paragraph, he criticizes the proviso to s. 322(1) for its lack of clarity and, in despair, makes a plea for Parliamentary intervention so that justice might be done to claimants with only partial interests in land. This is how he puts it:

> While the law might have been made clear, justice remains to be done to claimants with only partial interests in land. After all they should also be protected. That protection can only be effected by suitable amendments to the 1965 Code. The Courts are now powerless. What is the point of the 1965 Code recognizing partial interests in land, e.g. a transfer or a lease of a portion by registration when those putative rights prior to registration are not capable of protection by caveats? The decision of the Supreme Court must have been most disappointing but it was not altogether unexpected. The fault lies in the legislation. The law might have been made certain. In the result injustice has occurred. We have reached the point where the situation cries for a remedy by Parliament.

Before we take our discussion on the point at issue further, there are some general observations which we should like to make regarding the problems which face the draftsman on the one hand and the Court of construction on the other.

The draftsman's lot is indeed hard requiring, as it undoubtedly must, a considerable degree of precision. A sympathetic voice has pointed out that "there is nothing so common in the framing of instruments as that whilst the framer of them is studious to avoid one inconvenience, he incurs another which does not present itself to his view. This is often to be seen in Acts of Parliament". (See *Lord Nelson v. Tucker* [1802] 3 B. & P. 257 at 275, per Heath J.).

And, on another occasion, the Court had struck a note of true judicial humility when it observed:

> the public are little able to appreciate the grounds of doubt in the breasts of different Judges; and it naturally tends to bring the administration of the law into contempt, when they see before them conflicting interpretations of the same statute. This is a thing to be avoided where it can be. Every opinion of every Judge is fallible; and this is a principle to be recognised in the expression of a decision. (See *Coyne v. Brady* [1863] 9 LT 30 at 31 per Monahan CJ).

To resume our discussion on the point at issue. True it is that the proviso to s. 322(1) prohibits the entry of a caveat over part of the land, yet it says nothing about the validity of a caveat over the whole land but whose effect is limited to protect a claim to a registrable interest in a portion or an undivided share thereof.

There are two sides to the coin. The arguments in support of the prohibition that a caveat must not be wider than is justified by the caveator's interest, are formidable, the more obvious ones being, so far as the caveatee is concerned, it would be manifestly unjust that he should be prevented from dealing with the whole of his land when the caveator's claim relates only to part thereof; so far as a purchaser or other persons dealing with the caveatee are concerned, they have a right to know precisely

a what hostile claims to the land confront them; so far as the Proper Registering Authority is concerned, he has a right to know how he should respond to other dealings with parts of the land on the Register Document of Title.

Having said that, it is difficult to rebut the contention that it would be unjust to deny the remedy of a caveat, to a person claiming an estate or a proprietary interest in part of a parcel of land. Reason and justice indicate that the types of interest in land which b will afford sufficient grounds for lodging a caveat should be confined to the number of permissible interests in land recognised under the Code as being either registrable or entitled to protection (*Registrar of Titles, Johor Baharu v. Temenggong Securities & Anor.* [1976] 2 MLJ 44 per Lord Diplock at p. 47).

Similarly, Woodman and Nettle in their work on the **Torrens System in New** c **South Wales**, at page 524/19, para 74F.7 (Release 7) say this:

> The number of interests which will support a caveat is limited by the number of permissible interests in land. Section 74F makes it clear that a caveator must claim an estate or interest in land, and any proprietary interest at law or in equity supports lodgment and extension of a caveat.

d To take our discussion further, the Code confers upon a registered proprietor the right to deal with his land either in whole or in part; for example, he may lease part of his land (s. 221) or, if he is a registered co-proprietor, he is at liberty to transfer (s. 214(1)(b)) or to charge (s. 241(1)(b)) the whole of his undivided share in his land or he may grant an easement over a portion of the servient land (see Part Seventeen, Chapter 1 of the Code).

e In so holding, we have not overlooked s. 214(1)-(a) which **bars** the transfer of part only of alienated land. But the case of *Peter Lai v. Collector of Stamp Duties* [1973] 2 MLJ 33 shows - in our view correctly - that a transfer from the registered proprietor to himself and the purchaser does not contravene s. 214(1)(a). Such dealings create interests in land capable of being registered under the Code.

f Having regard to the categories of persons specified in s. 323(1)(a) of the Code, at whose instance a caveat may be entered, it would appear that a person claiming as such lesee, transferee, chargee, or grantee of the easement, respectively, as aforesaid, would be entitled to take advantage of the caveat procedure unless, of course, the proviso to s. 322 of the Code has the effect of barring the entry of a caveat by such persons.

g However, the words of the proviso must be read in their context. By this is meant, we must not only read the words of the proviso in the light of s. 322 as a whole but also in the light of the Code as a whole. Thus, it was said by the Court in *Arataki Honey Ltd. v. Minister of Agriculture and Fisheries* [1979] 2 NZLR 311 at 316:

> The Act must be read as a whole and that all sections must be read bearing in mind the provisions of other sections. It is not necessary for one section to refer specifically h to another section before the first section can be construed as being subject to or overriding or in some other way qualifying the other section.

So, also, in *Canada Sugar Refining Co. v. The Queen* [1898] AC 735 Lord Davey said (at p. 741):

> Every clause of a statute should be construed with reference to the context and other i clauses in the Act, so far as, possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter.

If, therefore, a section is open to two different constructions, a consideration of that section in the context of the Act in which it appears, may indicate which of the two constructions is to be given to the section. As Stout CJ said in *Ex parte Bouvy (No. 3)* [1900] 18 NZLR 608 at 613:

> In order to maintain that position, reliance is placed on s. 15...; and s. 15, standing by itself, is no doubt wide enough to cover such an appeal... We have, however, to look at the whole statute, and not only at a special section of it.

It is with the above principles of construction in mind that we revert to the issue at hand.

We accept, particularly, in the face of the passages in Judith Sihombing's book which we have quoted, that the proviso to s. 322(1) is open to two constructions; broadly stated, on the one hand, that its effect is to nullify *Vangedasalam* and, on the other, that its effect is to be merely declaratory of *Vangedaselam*.

The stumbling block in the way of accepting the contention of Mr. Sethu that the proviso to s. 322(1) nullifies *Vangedaselam*, is that, if correct, it would lead to the startling conclusion that the types of dealings in part of the land although permitted under s. 221 or para (b) of s. 214(1), or para (b) of s. 241(1) or Part Seventeen, Chapter 1 (described above), will not give rise to an interest in land capable of being protected by caveat. This may cause great hardship to one claiming an interest as lessee, transferee, chargee or grantee of an easement in such dealings, but one can also see that equal hardship would be caused to a caveatee who is prevented from dealing with the whole of his land where the caveator's claim relates only to part thereof.

In these circumstances, reading the proviso not only in the light of s. 322 as a whole but also in the light of the provisions of the other related sections in the Code to which we have referred, we consider that we would not be justified in acceding to the contention of Mr. Sethu.

In other words, we would answer the question arising upon the preliminary point of law in favour of the appellant caveator; that is to say, that the proviso to s. 322(1) is purely declaratory of the principles enunciated in *Vangedaselam*.

In particular, we endorse the following passages in the judgment of Suffian LP in *Vangedaselam*.

On the scope of ss. 322, 323 and 324, his Lordship said (at pp. 162-3):

> I am of the opinion... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

On the steps to be complied with by he who wishes to enter a private caveat to protect only a particular interest in land, his Lordship said (at p. 163):

> In that event when applying for entry of a caveat he should so state in Form 19B in paragraph 1, and in paragraph 2 he should give the grounds of his claim. (He should not claim a caveat to be expressed to bind the land itself). He should also cause to be inserted in Form 19A a description of the particular interest claimed and a description of the effect of the caveat.

Advising further on the drafting of such caveat, he added (at p. 164):

> ...when applying for the caveat you state the nature of the registrable interest you claim, you do not use mere general words, you do not claim more than what is

a warranted, the caveat sufficiently states the quantum of the estate or interest which you claim, and you limit the prohibition of your caveat to such dealings as your claim, if well founded, entitles you to forbid.

That, however, is not the end of the matter.

In an additional submission in writing dated 4 April 1994, put in after the Court had b reserved judgment, Mr. Sethu had sought to rely on the Hansard reports; in particular, he had sought to rely on the statement of the Minister concerned made in Parliament when introducing the National Land Code (Amendment) Bill 1984, which led to the enactment of the proviso to s. 322(1), in support of his contention regarding the true construction of the proviso.

We therefore reassembled to give Counsel on both sides an opportunity to address us c on this important point of statutory interpretation.

The historic rule of the Common Law, has been, until the landmark decision of the House of Lords in *Pepper v. Hart* [1992] 3 WLR 1032, that it is not permissible, when construing a statute, to refer to the reports in Hansard of proceedings in either House of Parliament. (See *Davis v. Johnson* [1979] AC 264; *Hadmor Production Ltd. v.* d *Hamilton* [1983] 1 AC 191). The traditional basis for this rule - the exclusionary rule - being that written instruments should be construed having regard to what is within the four walls of the written instruments, all external references being excluded.

However, in the landmark decision of *Pepper v. Hart*, the House of Lords, by a majority of 6 to 1 (Lord Mackay LC dissenting) held that subject to any question of parliamentary privilege, the exclusionary rule should be relaxed in certain circum- e stances. What these circumstances are, appear sufficiently from the leading speech of the House delivered by Lord Brown -Wilkinson at p. 64 d:

> My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, f reference to parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in Court to parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the minister or other promoter of the Bill is likely g to meet these criteria.

It follows that the majority of the House refused to follow the previous decisions of the House which supported the orthodox view, thus applying the **Practice Statement (Judicial Precedent)** (1966) WLR 1234.

In three subsequent cases which followed closely on the heels of *Pepper v. Hart* - h namely, *R. v. Warwick shire County Council ex p. Johnson* [1993] 2 WLR 1; *Stubbings v. Webb* [1993] 2 WLR 120 and *Foster v. Chief Adjudication Officer* [1993] 2 WLR 292 - the House of Lords referred to Hansard as an aid to statutory construction.

We note that in Singapore, the Courts have followed the majority judgment in *Pepper v. Hart*. (See, *Tan Boon Yong v. Controller of Income Tax* [1993] 2 SLR 48, 55., *Raffles* i *City Pte Ltd. v. A.G.* [1993] 3 SLR 580, 587-88, *Low Kok Wai v. PP* [1994] 1 SLR 676,

684 D-E.) Indeed, the rule in *Pepper v. Hart* has now received statutory recognition there in the Interpretation (Amendment) Act 1993. This follows similar amendments made in Australia in 1984 to the Interpretation Act 1901, by the insertion of s. 15 AB which permits reference to Hansard reports as an aid to statutory interpretation. In New Zealand, the rule in *Pepper v. Hart* is followed by the Courts, though it has not been placed on a statutory footing. (See Jim Evans on **Statutory Interpretation** 290-291 (OUP, New Zealand, 1989).

We have also considered the cogent criticisms of the majority view in *Pepper v. Hart*, by Mr. J.H. Baker in his article entitled "**Statutory Interpretation and Parliamentary Intention"** (1993) 52 Cambridge Law Journal 353, by Mr. Brian Davenport in his article entitled **"Perfection - But at what cost?"** (1993) 109 Law Quarterly Review 149 and by Mr. David Miers in his article entitled **"Taxing Perks and Interpreting Statutes"** (1993) 56 Modern Law Review 695. Nevertheless, we have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand, and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to Hansard as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to an absurdity and provided always that the statement reported in Hansard was made by a Minister or other promoter of a Bill. More particularly, we gratefully adopt the passage in the judgment of Lord Browne - Wilkinson in *Pepper v. Hart*, reproduced above.

We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an **aid** to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

We therefore proceeded to consider the various passages in the Ministerial Statement reported in Hansard, relied upon by Mr. Sethu, with a view to resolving the ambiguity in the proviso to s. 322(1) to which we have referred, but having done so, we have arrived at the conclusion that they do not assist us at all.

In these circumstances, we see no reason to depart from what we have hereinbefore said regarding the effect of the proviso to s. 322(1).

The appellant is therefore entitled to succeed on the preliminary point of law, but as there are other objections to the caveat, the hearing thereof, will be adjourned to a date to be fixed by the Registrar.